Supreme Court, U.S.
FILED
NOV 30 2015
OFFICE OF THE CLERK

No. 15-513

IN THE

Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL.
CORI RIGSBY; KERRI RIGSBY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 30, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Contrary to Respondents' contention, five federal courts of appeals have adopted three conflicting positions regarding the sanction for a *qui tam* relator's violations of the mandatory seal requirements of the False Claims Act ("FCA"). (Pet.14-19.) Respondents ignore the United States' acknowledgement that this conflict "warrants resolution by this Court." Brief for United States as Amicus Curiae at 7, *United States ex rel. Summers v. LHC Group*, No. 10-827 (U.S. May 2011). Moreover, the Fifth Circuit's decision conflicts with this Court's jurisprudence regarding statutory prerequisites to suit. This Court should grant certiorari to resolve these conflicts and establish a uniform national rule regarding the consequences of a violation of the FCA seal requirement.

This case also presents the question of whether FCA relators can establish scienter on the part of a corporation or other organization based on a generalized intent to perpetrate a fraudulent scheme without connecting that generalized scheme to submission of the alleged false claim. The Fifth Circuit's failure to require a causal link between the purported generalized scheme and the alleged false claim drastically expands FCA liability and exacerbates the existing circuit split regarding the requirements for establishing corporate scienter. This case presents an optimal vehicle for the Court to resolve these important and recurring questions of federal law.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FIFTH CIRCUIT'S FAILURE TO ENFORCE THE FCA SEAL REQUIREMENT

A. The Fifth Circuit's Decision Exacerbates the Acknowledged Circuit Conflict

Respondents incorrectly contend that there is no important conflict for the Court to resolve regarding the consequence for noncompliance with the FCA seal requirement. Respondents improperly downplay the significance of the conflict between the Sixth Circuit's decision and the decisions of the Fifth Circuit in this case and the Second, Fourth and Ninth Circuits by arguing that the Sixth Circuit's mandatory dismissal rule applies only to initial failures to serve the Government and file under seal. (Opp.16.) The Sixth Circuit, however, expressly rejected a distinction between initial failures to file under seal and post-filing failures to maintain the seal. *United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 294-96 (6th Cir. 2010). The Sixth Circuit explained that the Ninth Circuit's "*Lujan*-style balancing test" – including its inquiry into the severity of the breach and whether the violation was an initial breach or post-filing – improperly rebalanced factors that Congress had already balanced and was "a form of judicial overreach." *Id.* at 296. Here, in contrast, the Fifth Circuit followed the Ninth Circuit in holding that Respondents' post-filing breaches (although repeated and in bad faith) were "considerably less severe" than an initial failure to file under seal and did not merit dismissal. (22a-23a).

Respondents erroneously argue that certiorari should be denied because the Sixth Circuit's decision is an "outlier" and "marginalized." (Opp.17.) To the contrary, the Sixth Circuit's mandatory dismissal rule is squarely based on principles of law that have been determinative in this Court's decisions on similar issues of whether, under statutes granting a private right of action, compliance with a statutory procedural provision "is a mandatory precondition to suit or can be disregarded by the district court at its discretion." *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 23 (1989); *see* Pet.19-25. This Court's relevant decisions were ignored by the Fifth and Ninth Circuits.[1]

Respondents also incorrectly claim that the Fifth, Ninth, Second and Fourth Circuits are in accord except for "minor differences" in language. (Opp.12.) The Fifth Circuit itself acknowledged that "three circuits have addressed the consequences of an FCA seal violation and come to divergent conclusions" (19a), and legal commentators have noted the three-way circuit split. *See, e.g.*, Robert Sherry, *Confusion Over FCA's Seal Requirements Continues*, Law 360 (8/25/2015), at www.law360.com/appellate/articles/6929295.

The differences between the Fifth and Ninth Circuits and the Second and Fourth Circuits are significant. Most importantly, the Fifth and Ninth Circuits have held that dismissal is not an appropriate

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[1] Respondents devote six pages to discussing the district court cases listed in State Farm's Appendix. (Opp.18-24.) These numerous cases illustrate the frequency with which federal courts address seal issues and thus the importance of addressing this circuit conflict. (Pet.19.)

remedy for noncompliance with the seal requirement absent a showing of actual harm to the Government. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995); Pet.15-16. The substantial difficulties of showing actual harm to the Government inevitably result in under-enforcement of the seal requirement, as illustrated by this case, where Respondents' repeated intentional breaches of the seal had no consequences.

In contrast, the Second Circuit in *United States ex rel. Pilon v. Martin Marietta Corp.* made clear that that its "frustration of the statutory purposes" standard does not require a finding of actual harm to the Government. 60 F.3d 995, 998-99 (2d Cir. 1995). Rather, the principal objective of the seal period was to "'allow the Government an adequate *opportunity* to fully evaluate the private enforcement suit ....'" *Id.* (emphasis added; citation omitted). Thus, under *Pilon*, the possibility of interference with the Government's investigation means that the statutory objective is frustrated. *Id.* at 999; Pet.18. Likewise, the Fourth Circuit rejected what it termed the Ninth Circuit's "'no harm, no foul' balancing test." *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015).

In addition, the Ninth and Fifth Circuits have forbidden any weighing of harm or potential harm to a defendant's reputation, *Lujan*, 67 F.3d at 247, while the Second and Fourth Circuits hold that reputational harm is a relevant factor. *Smith*, 796 F.3d at 430; *Pilon*, 60 F.3d at 999; Chamber *Amicus* 8-13. The significant risk of harm to a defendant's reputation is evidenced by this case, where Respondents and their

counsel repeatedly violated the seal as part of their media campaign to demonize and put pressure on State Farm to settle. (Pet.9-11; WLF *Amicus* 12-15.)

In short, the issue of the consequences for an FCA seal violation presents a genuine conflict among the Circuits on an important and recurring question of federal law, warranting certiorari.

B. The Fifth and Ninth Circuits' Analysis Conflicts with This Court's Jurisprudence

Certiorari also should be granted because the Fifth Circuit's decision conflicts with this Court's decisions addressing statutory prerequisites to suit. Respondents mischaracterize State Farm as broadly arguing for a "universal mandatory dismissal rule whenever a procedure in a statute that creates a cause of action has not been satisfied." (Opp.24.) To the contrary, the specific statutory language and structure of section 3730 show that the seal requirement is a mandatory condition to suit in *qui tam* actions. (Pet.19-25; WLF *Amicus* 9-11; ATRA *Amicus* 9-10.)

Relying on *Dolan v. United States*, 560 U.S. 605 (2010), and *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), Respondents incorrectly argue that the FCA's 60-day seal period is merely a "'timing provision[],'" and that "'coercive sanction[s]'" are not ordinarily imposed for failure to comply with a timing provision unless the statute dictates such a consequence. (Opp.25.) *Dolan* and *Barnhart* are both inapposite. The statutes at issue in those cases had nothing to do with private actions under federal

statutes, but were statutory deadlines for actions by federal courts or government agencies. *Dolan* addressed the statutory time limit for a federal court to order restitution in a criminal case. 650 U.S. at 608-11. *Barnhart* addressed a statutory deadline for the Commissioner of Social Security to assign coal industry retirees to coal companies. 537 U.S. at 152.

Moreover, in both *Dolan* and *Barnhart*, this Court's analysis depended on the character of the statutory provision as a purely "time-related directive." *Dolan*, 560 U.S. at 611; *Barnhart*, 537 U.S. at 158-59. However, like the 60-day notice provision at issue in *Hallstrom*, the FCA seal requirement is *not* a timing provision. In *Hallstrom*, in holding that compliance with a 60-day notice provision was a mandatory precondition to suit, this Court expressly distinguished 60-day notice provisions from statutory deadlines and timing provisions, which are not generally preconditions to suit, but essentially "operate[] as a statute of limitations" and are traditionally subject to equitable modification. 493 U.S. at 27. Here, the FCA seal provision not only provides for notice by service to the government under seal, but also requires maintenance of the seal for at least 60 days and permits the suit to be unsealed only by order of the court. Under *Hallstrom*, the FCA seal requirement must be deemed a mandatory condition to suit.

Respondents erroneously argue that the FCA seal requirement differs from the 60-day notice provision at issue in *Hallstrom*, contending that the 60-day notice provision "expressly mandated dismissal of actions that did not comply with a 60-day deadline." (Opp.28.) In fact, that provision did not specify a sanction for

noncompliance. Indeed, the dissenting Justices in *Hallstrom* stressed that "the statute specifies no sanction." 493 U.S. at 35 (Marshall, J., and Brennan, J., dissenting). In holding that dismissal was mandated, the *Hallstrom* majority necessarily rejected the dissenting view that where a statute does not require a specific sanction, "factors extrinsic to statutory language enter into the decision as to what sanction is appropriate." *See id.* Yet, consideration of "factors extrinsic to the statutory language" is precisely the approach erroneously adopted by the Fifth and Ninth Circuits in the *Lujan*-balancing test.

Moreover, the fact that the FCA seal provision was not couched in the standard language for 60-day notice provisions does not mean that compliance is not a mandatory precondition to proceeding with suit. Like a 60-day notice provision, the FCA seal provision gives the Government an opportunity to investigate. However, as the specifics of the FCA seal provision indicate, Congress had concerns about ensuring the Government's ability to investigate in the FCA context that were not satisfied by a 60-day notice requirement. Thus, in addition to notice, section 3730 provides the further protections of a 60-day seal, a mechanism for the Government to extend the 60-day period, and a prohibition on service on the defendant without a court order. 31 U.S.C. §3730(b)(2)-(3). Congress' insistence on these extra protections in FCA cases in no way evinces an intent to make compliance optional or to give courts discretion in enforcing the provision.

Rather, it confirms the mandatory nature of the seal requirement.[2] (*See* Pet.19-25; WLF *Amicus* 9-11.)

In sum, the Fifth Circuit's interpretation of the FCA seal provision not only conflicts with decisions of other Circuits, but also is contrary to decisions of this Court addressing the consequences of noncompliance with statutory preconditions to bringing private rights of action under federal statutes. A grant of certiorari is warranted.

II. CERTIORARI IS WARRANTED TO CORRECT THE FIFTH CIRCUIT'S OVERBROAD INTERPRETATION OF THE FCA'S SCIENTER REQUIREMENT

Contrary to Respondents' contention that the FCA's scienter requirement should be interpreted "broadly" (Opp.30), courts have repeatedly recognized that "strict enforcement" of that requirement is necessary to limit liability to fraud, as intended by the statute. *See, e.g.*, *United States ex rel. Jones v. Brigham & Women's Hosp.*, 678 F.3d 72, 86 (1st Cir. 2012); *United States v. SAIC*, 626 F.3d 1257, 1271 (D.C. Cir. 2010); Academy *Amicus* 5-13; NACDL *Amicus* 4-6,17-21. Here, the Fifth Circuit gave two

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[2] Contrary to Respondents, *Mach Mining, LLC v. E.E.O.C.*, supports dismissal of their claims, by reaffirming the rule that courts "routinely enforce . compulsory prerequisites to suit" and will dismiss for failure to comply. 135 S.Ct. 1645, 1651 (2015). The statute reviewed in *Mach* allowed the *Government* to obtain a stay to conduct the required attempt to conciliate. The FCA has no analogous provision. Moreover, a relator who has breached the seal, as Respondents did here, cannot repair the breach and return matters to the *status quo ante*.

grounds for its affirmance on scienter: (i) a purported collective fraudulent scheme, without causal connection to the decision to submit the allegedly false claim; and (ii) the post-submission knowledge of an employee who was not involved in the decision to submit the claim. Both of those grounds present fundamental conflicts with other Circuits and dramatically expand liability under the FCA.

A. The Fifth Circuit's Decision Improperly Relied on Collective Knowledge

Respondents wrongly contend that the Fifth Circuit's decision does not present the issue of collective knowledge. (Opp.31.) Although the Fifth Circuit did not use the words "collective knowledge," it improperly relied upon a purported scheme by certain State Farm employees to mischaracterize wind damage as flood damage. That is, the Fifth Circuit improperly pieced together the purported wrongful intent and generalized knowledge of the "perpetrators" of the alleged scheme with the actions and knowledge of the employees who adjusted the McIntosh flood claim. (37a-38a; Pet.31-35.) This is precisely the kind of "collective" knowledge that other Circuits have rejected. The FCA "focuses on the submission of a claim," and a purported "scheme" that did not affect the claim at issue is not a basis for liability. *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002); *see also United States ex rel. Burlbaw v. Orenduff*, 584 F.3d 931, 952-53 (10th Cir. 2008) ("proper focus of scienter inquiry" rests on "the defendant's 'knowledge' of whether the claim is false"); NACDL *Amicus* 15-17.

The only claim tried in this case was the McIntosh flood claim. None of the other flood claims submitted after Hurricane Katrina was at issue. Even assuming *arguendo* that a generalized scheme existed to "presume" flood damage, the existence of such a scheme, in itself, cannot establish that State Farm knowingly submitted a false claim for flood damage to the McIntosh house. The determination whether wind or flood caused particular damage to a specific house required an individualized inspection and assessment. Respondents' generalized assertion that it was sufficient to prove that Lecky King "recklessly caused State Farm to submit flood claims ... without knowing whether wind or flood caused the damage" (Opp.30) is incorrect as a matter of law in the absence of a causal connection between the scheme and the individual McIntosh claim. *See Aflatooni*, 314 F.3d at 1002.

Respondents do not dispute that State Farm supervisor John Conser, who approved the submission of the McIntosh flood claim and the use of the supposedly false record, acted in good faith after reviewing the file and the photographic evidence of the damage to the McIntosh house. (Pet.8-9.) The Fifth Circuit did not explain (nor do Respondents) how the purported "scheme" had any effect on Conser's decision to submit the claim. The Fifth Circuit's determination that the unspecified, generalized knowledge of the "perpetrators" of the "scheme" satisfied scienter is contrary to the rejection of collective knowledge by the Fourth Circuit in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918

n.9 (4th Cir. 2003), and by the D.C. Circuit in *SAIC*, 626 F.3d at 1274.[3] (Pet.29-35.)

B. The Fifth Circuit Incorrectly Imposed Liability Based on After-the-Fact Knowledge, in Direct Conflict with Other Circuits

The Fifth Circuit held alternatively that "even if we were to agree that one individual must have knowledge that a claim is false" (*i.e.*, even if collective knowledge may not be pieced together to show scienter), supervisor King "alone, 'act[ing] in reckless disregard of the truth or falsity' of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used." (39a (quoting 31 U.S.C. §3729(a)(1), (a)(1)(B), (b)(1)(iii)).)

Respondents mischaracterize this statement as a "factual finding" by the Fifth Circuit that State Farm "asks this Court to assume ... is false." (Opp.33.) The Fifth Circuit's recitation of the statutory language is a legal conclusion based upon Lecky King's purported knowledge and actions *after* the McIntosh flood claim had already been submitted, as the Fifth Circuit's opinion makes clear. (38a n.15; Pet.35-36.) The Fifth

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[3] Contrary to Respondents, this is not an "innocent certifier" case where another employee had knowledge that was kept from the certifier or a case involving a "'method that makes uses of innocent individuals or businesses to reach and defraud the United States.'" (Opp.34 (citation omitted)) There has been no showing that State Farm's "structure" prevented supervisor Conser "from learning facts that made its claims for payment false." *SAIC*, 626 F.3d at 1276; Academy *Amicus* 14-16.

Circuit's reliance on such after-the-fact knowledge creates a further circuit conflict and raises a legal issue, not factual issues of sufficiency of the evidence as Respondents claim. (Opp.35). Respondents fail to address the cases cited by State Farm in which other Circuits have rejected the use of after-the-fact knowledge to establish scienter. (Pet.35-36.) Nor do Respondents or the Fifth Circuit point to any facts showing that King knew *anything* about the McIntosh flood claim at the time it was submitted, much less that it was false.

Respondents' and their expert's theory at trial was that the McIntosh house was "wracked" by wind and destroyed before the floodwater did its extensive damage. (7a;33a) That theory is incompatible with any notion of scienter on the part of King or anybody else, as Respondents do not contend that anybody at State Farm knew or should have known, at the time the claim was submitted, that the McIntosh house was wracked by wind. (Pet.34-35.)

The Fifth Circuit's ruling that scienter was satisfied through the alleged "scheme" or through King alone directly conflicts with the requirement adopted by the Fourth Circuit that at least one employee "knew of facts" that made the claim or certification false "*before* [the company] submitted the [claim or] certification." *See Harrison*, 352 F.3d at 919 (emphasis added). No State Farm employee knew that the McIntosh claim was false at the time it was submitted. The Fifth Circuit's ruling conflicts even more strongly with the D.C. Circuit's holding that corporate scienter under the FCA requires that at least one employee must know *both* the underlying facts that would

render a claim or certification false *and* that a false claim or certification is being made. *SAIC*, 626 F.3d at 1276.

Certiorari is warranted to resolve these fundamental circuit conflicts on the standard for corporate scienter under the FCA.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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